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No. 93-5131

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PAUL PALALAUA TUILAEPA, Petitioner,

v.

THE STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

(SUPPLEMENTAL)

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Lawyer for Petitioner

8 pp

QUESTION PRESENTED

V. Petitioner was denied a fair trial in violation of Cage v. Louisiana because his jury was instructed concerning reasonable doubt in such a way that it was permitted to judge his culpability based upon vague and unidentifiable moral notions instead of based upon evidence produced in court.

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NEW INTERVENING MATTER

On Friday, October 1, 1993, while out of town in San Francisco, counsel for petitioner heard that on September 28, 1993, this court had granted certiorari in Sandoval v. California, 92-9049, as well as in Victor v. Nebraska, 92-8894, regarding the validity of the "reasonable doubt" instructions in California and Nebraska, as they incorporate the concept of "moral certainty."[1] The Tuilaepa jury was instructed in the words of the California jury instruction statute, Penal Code § 1096. With the exception of one inconsequential word, the Sandoval and the Tuilaepa juries were instructed identically regarding reasonable doubt.[2]

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[1]As framed by petitioner in Sandoval that issue is:

> "I. Was petitioner deprived of due process and a fair jury trial by the use of constitutionally defective reasonable doubt instructions which invited the jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation? (Cage v. Louisiana, 498 U.S. 39 (1990); Sullivan v. Louisiana, 508 U.S. ___, 124 L.Ed.2d (June 1, 1993).)

Sandoval v. California, supra, Petition, p.i.

[2]The Tuilaepa jury was instructed in the exact words of the statute:

> "The defendant in a criminal action is presumed to be innocent until the contrary is proved. And in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the state ["people" was used in Sandoval instead of "state"] the burden of proving guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the

A. THE CONSTITUTIONAL DEFECTS IN THE CALIFORNIA REASONABLE DOUBT INSTRUCTION[3]

1. Petitioner's due process rights under Cage v. Louisiana, 498 U.S. 39, 112 L.Ed.2d 339 (1990), have been violated

In Cage, the court condemned the use of the term "moral certainty" in place of "evidentiary certainty." The nub of the problem was, and is, that the jury should be deciding the guilt of a defendant based upon evidence or evidentiary considerations, and not by using some unknowable moral grid which would surely vary from juror to juror.

2. The unconstitutional aspects of the instruction

First, the instruction is ambiguous, indeed unintelligible, when it states to the jury the following concerning what reasonable doubt is not, "it is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt." Surely if 12 persons were asked to write down in a sequestered manner their definition of "moral evidence," the responses would wildly vary.

Second, and likewise, the use later in the instruction of the term "moral certainty" tends to cloud the difference between judging petitioner's conduct by statutory elements of a crime based upon trial evidence, including testimony, as opposed to judging

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charge."
(RT 3:636-7)

[3]In view of the duplicate nature of the Sandoval and Tuilaepa instructions, the previously granted certiorari in that matter, as well as the shortness of time, petitioner utilizes the arguments briefed in Sandoval, though in a more summary form.

that conduct based upon some unknown, and unknowable, moral scheme personal to each individual juror.

B. STANDARD IS REVERSIBLE PER SE

Instructional error regarding the reasonable doubt instruction has been held by the court to be reversible per se because of the effect of such misdirection and error on the deliberations and verdicts of a jury. Sullivan v. Louisiana, 508 U.S. ___, 124 L.Ed.2d 182, 190.

CONCLUSION

Therefore, it is urged that the court grant petitioner's writ of certiorari on this new intervening matter.

Dated: October 5, 1993
6:30 p.m.

Respectfully submitted,

HOWARD W. GILLINGHAM
Attorney for Petitioner
PAUL PALALAUA TUILAEPA

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 4370 Tujunga Avenue, Suite 105, North Hollywood, California 91604.

On October 6, 1993, I served the foregoing document described as ** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Clerk of the Court
California Supreme Court
303 2nd Street, South Tower
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Patrick T. Brooks, Esq. (ALSO FAXED AT 9:00 A.M., 10/6/93)
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_X__ (BY MAIL)

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at North Hollywood, California, in the ordinary course of business. I am aware that on motion of the parties served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on October 6, 1993, at North Hollywood, California.

I declare under penalty or perjury under the laws of the State of California that the above is true and correct.

HOWARD W. GILLINGHAM
Declarant